Supreme Court, U.S.
FILED
OCT 25 1993
OFFICE OF THE CLERK

No. 93-447

In the Supreme Court of the United States

OCTOBER TERM, 1993

ROBERTO TORO, JR., PETITIONER

v.

UNITED STATES OF AMERICA
(AND OTHER CASES)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

JEFFREY T. INFELISE
Colonel, USAF

JULES D. SILBERBERG
Captain, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division
Air Force Legal Services Agency
Bolling Air Force Base
Washington, D.C. 20332-5113

BEST AVAILABLE COPY

10 pp

QUESTIONS PRESENTED

1. Whether the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2, prohibits Congress from authorizing the Judge Advocates General to select commissioned officers in the military to serve as court-martial trial judges and judges of the courts of military review.

2. Whether due process requires that court-martial trial judges and judges of the courts of military review have fixed terms of office.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

United States v. *Rice*, 36 M.J. 362 (C.M.A. 1993)	5
Weiss v. *United States*, cert. granted, No. 92-1482 (May 24, 1993)	4, 6

Constitution and statutes:

U.S. Const. Art. II, § 2, Cl. 2 (Appointments Clause)	4, 5
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 67a(a), 10 U.S.C. 867a(a) (Supp. IV 1992)	5
Art. 67(c), 10 U.S.C. 867(c) (Supp. IV 1992)	5
Art. 85, 10 U.S.C. 885	3
Art. 95, 10 U.S.C. 895	3
Art. 112a, 10 U.S.C. 912a	2, 3
Art. 118, 10 U.S.C. 918	3
Art. 120, 10 U.S.C. 920	3
Art. 121, 10 U.S.C. 921	3
Art. 123, 10 U.S.C. 923	3
Art. 128, 10 U.S.C. 928	3, 4
Art. 134, 10 U.S.C. 934	3, 4
28 U.S.C. 1259(3) (Supp. III 1991)	5

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-447

ROBERTO TORO, JR., PETITIONER

v.

UNITED STATES OF AMERICA
(AND OTHER CASES)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Military Appeals, Pet. App. 89a-103a, and the Air Force Court of Military Review, Pet. App. 104a-133a, in *United States* v. *Toro* are reported at 37 M.J. 313 and 34 M.J. 506, respectively. The opinion of the Court of Military Appeals, Pet. App. 134a, in *United States* v. *Lipscomb* is not yet officially reported; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Coppock*, Pet. App. 135a-149a, is reported at 37 M.J. 145; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Harvey*, Pet. App. 150a-158a, is

reported at 37 M.J. 140; the opinion of the Air Force Court of Military Review in that case is reported at 33 M.J. 822. The opinion of the Court of Military Appeals in *United States* v. *Teters*, Pet. App. 159a-177a, is reported at 37 M.J. 370; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Perry*, Pet. App. 178a-182a, is reported at 37 M.J. 363; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Proctor*, Pet. App. 183a-198a, is reported at 37 M.J. 330; the opinion of the Air Force Court of Military Review in that case is reported at 34 M.J. 549.

JURISDICTION

The judgment of the Court of Military Appeals was entered in *United States* v. *Toro* on August 3, 1993, in *United States* v. *Lipscomb* on August 20, 1993, in *United States* v. *Coppock* and *United States* v. *Harvey* on June 25, 1993, in *United States* v. *Teters* on August 12, 1993, and in *United States* v. *Perry* and *United States* v. *Proctor* on August 18, 1993. The petition for a writ of certiorari in these cases was filed on September 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. III 1991).

STATEMENT

Petitioner Toro was convicted of three specifications of using methamphetamines, one specification of introducing methamphetamines onto a military facility, and two specifications of distributing methamphetamines, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 912a. He was sentenced to confinement for seven years, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank to the lowest enlisted grade. Pet. App. 129a.

Petitioner Lipscomb was convicted of premeditated murder and obstruction of justice, in violation of Articles 118 and 134 of the UCMJ, 10 U.S.C. 918 and 934. He was sentenced to confinement for life, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank to the lowest enlisted grade. The confinement was reduced by the convening authority to 60 years' imprisonment pursuant to a pretrial agreement.

Petitioner Coppock was convicted of two separate desertions, escaping from confinement, unlawful carnal knowledge, two automobile larcenies, assault on a civilian police officer, and kidnapping a four-year-old child, in violation of Articles 85, 95, 120, 121, 128, and 134 of the UCMJ, 10 U.S.C. 885, 895, 920, 921, 928, and 934. He was sentenced to confinement for 25 years, a dishonorable discharge, total forfeitures of pay and allowances, and reduction to the lowest enlisted grade. Pet. App. 135a-136a.

Petitioner Harvey was convicted of using and distributing cocaine and endeavoring to impede an investigation, in violation of Articles 112a and 134 of the UCMJ, 10 U.S.C. 912a and 934. She was sentenced to confinement for 15 months, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank to the lowest enlisted grade.

Petitioner Teters was convicted of four specifications of larceny and two specifications of forgery, in violation of Articles 121 and 123 of the UCMJ, 10 U.S.C. 921 and 923. She was sentenced to confinement for three months, a bad conduct discharge, forfeitures of $400 pay per month for three months, and a reduction in rank to the lowest enlisted grade. Pet. App. 150a-151a.

Petitioner Perry was convicted of use of cocaine, in violation of Article 112a of the UCMJ, 10 U.S.C. 912a. He was sentenced to confinement for one year, a bad conduct

discharge, and forfeitures of $200 pay per month for 12 months. Pet. App. 178a-179a & n.1.

Petitioner Proctor was convicted of multiple specifications of indecent acts and assaults on children under 16 years of age, in violation of Articles 134 and 128 of the UCMJ, 10 U.S.C. 934 and 928. He was sentenced to confinement for 30 years, a dishonorable discharge, total forfeitures of pay and allowances, and a reduction in rank to the lowest enlisted grade. Pet. App. 183a-184a.

In each case, the court of military review upheld the findings and sentence, and the Court of Military Appeals thereafter affirmed the judgment of the court of military review.

ARGUMENT

Petitioners present two claims. First, they argue that the military trial and appellate judges in their cases were not qualified to hold those positions because they were appointed to them by the Judge Advocate General of each respective service in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Second, petitioners claim that their trials and their appeals to the courts of military review were fundamentally unfair because the military judges sitting on those courts do not enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges.

The questions presented in this petition are not materially different from the questions presented in *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993), which the Court has already decided to review. Accordingly, we believe that this petition should be held until this Court has decided *Weiss* and should then be disposed

of as appropriate in light of the Court's decision in that case.*

---

* In the cases of petitioners Lipscomb and Toro, the Court of Military Appeals granted review on both the Appointments Clause and due process issues that are presented in the petition. By contrast, petitioners Coppock, Harvey, Teters, Perry, and Proctor did not raise either claim at any stage of their cases with regard to either their trial judges or the judges of the court of military review. See Pet. 3. What is more, no military court addressed those questions in their cases. Accordingly, it is not clear that those questions are subject to review by certiorari in this Court in those cases.

The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) (Supp. IV 1992) and 28 U.S.C. 1259(3) (Supp. III 1991), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. IV 1992), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit decisions in any case to less than all the issues urged by the defendant. Art. 67(c), UCMJ, 10 U.S.C. 867(c) (Supp. IV 1992). Since petitioners Coppock, Harvey, Teters, Perry, and Proctor did not raise those issues for review by the Court of Military Appeals and since that court did not pass on those issues, there is a question whether that court rendered a "[d]ecision" on the issues presented in the petition in the cases of petitioners Coppock, Harvey, Teters, Perry, and Proctor.

It is unnecessary to answer that question in this case, however, because the Court of Military Appeals has indicated that it will accept out-of-time requests for relief from servicemembers if this Court grants relief to servicemembers in any of the other cases presently pending before the Court raising the same issues. *United States* v. *Rice*, 36 M.J. 264 (1993). Thus, if this Court grants relief to the petitioners in *Weiss*, it may be appropriate to allow the Court of Military Appeals to decide whether to grant relief to parties such as these petitioners, since that course may render moot the question whether this Court can grant relief to such parties.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Weiss* v. *United States*, cert. granted, No. 92-1482 (May 24, 1993), and then should be disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JEFFREY T. INFELISE
Colonel, USAF

JULES D. SILBERBERG
Captain, USAF
Appellate Government Counsel
Government Trial and
Appellate Counsel Division

OCTOBER 1993